BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CESAR A. MARTINEZ TRUJILLO	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,036,070
CHEM-TROL, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 23, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark. The record in this appeal includes the Division of Workers Compensation administrative file; the transcript from the October 9, 2007, preliminary hearing; the medical records from the Wichita Clinic entered by written stipulation; and the transcripts from the October 22, 2007, depositions of Robin Hargis, Jerry White, and Jerry Cathcart.[1]

ISSUES

Claimant alleges he injured his back working for respondent as a chainsaw operator. At the October 9, 2007, preliminary hearing, claimant's counsel stated claimant was alleging he sustained a repetitive injury to his back, which began approximately two years before and continued each and every day he worked for respondent. Claimant's counsel also stated claimant was alleging he aggravated his back on *June 19, 2007*, which was the date claimant allegedly lifted a heavy tree limb and developed a hernia.

In the October 23, 2007, preliminary hearing Order, Judge Clark determined the lifting incident in question occurred on *May 15, 2007*, rather than on June 19, 2007, as

[1] Although it appears the Judge received the depositions and medical records after the October 23, 2007, Order was entered, the parties have opted to forego remand and for the Board to decide this appeal on the record enumerated above.

claimant had alleged. Moreover, the Judge determined claimant injured or aggravated his back in that lifting incident and, therefore, the Judge awarded claimant medical benefits under the Workers Compensation Act. In the October 23, 2007, Order, the Judge held in pertinent part:

> The claimant began having back-problems *[sic]* while working for this respondent in 2005. On May 15, 2007 while doing heavy lifting for the respondent claimant suffered a work related hernia which was accepted by the respondent as compensable.
>
> This court finds that the claimant also injured his back on May 15, 2007 when he aggravated a previous condition.
>
> Dr. Mark Dobyns is authorized as the claimant[']s treating physician for his back injury. All medical is ordered paid.

Respondent and its insurance carrier contend Judge Clark erred by awarding claimant the medical benefits for his back. They admit that claimant developed a hernia on *May 16, 2007*,[2] but they deny claimant injured his back at that time and that he provided respondent with notice of that injury. They also deny that claimant ever injured his back in an accident that arose out of and in the course of his employment with respondent. In the alternative, in the event claimant did injure his back at work, respondent and its insurance carrier contend claimant's back injury occurred in February 2005 and claimant failed to give respondent timely notice and timely written claim for that accident. In addition, they deny that claimant's back injury resulted from either repetitive or cumulative trauma. Finally, they contend claimant is not entitled to receive temporary total disability benefits because he was terminated for cause and respondent could have accommodated his work restrictions. In short, respondent and its insurance carrier request the Board to deny claimant's request for benefits for the alleged back injury.

Conversely, claimant requests the Board to affirm the preliminary hearing Order. Claimant argues the evidence proves he developed a hernia and injured his back picking up a 200-pound piece of wood and that he promptly reported both the lump in his groin and back injury to the person claimant believed was his supervisor, Antonio Lopez.

The issues before the Board on this appeal are:

1. Did claimant injure his back in an accident that arose out of and in the course of his employment with respondent? And if so, what is the date of that accident?

[2] P.H. Trans. at 4, 5.

2. Did claimant provide respondent with timely notice of the alleged back injury and timely written claim for workers compensation benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Respondent employed claimant as a chainsaw operator, which is a physical job that entails clearing tree limbs and brush. Claimant, who according to his medical records is five feet three inches tall and weighs 106 pounds, contends he developed a hernia and injured his back while lifting heavy pieces of wood that weighed approximately 200 pounds. Although claimant testified that incident occurred in June 2007, the medical records entered by written stipulation indicate the incident occurred on May 16, 2007. Indeed, claimant was not working anywhere in mid-June 2007 as he was recovering from hernia surgery. Consequently, it appears all references to a June 19, 2007, lifting incident at work actually refer to a May 16, 2007, incident.

There is no dispute that in May 2007 claimant reported to respondent he had developed pain or a lump in his groin after lifting heavy tree limbs. Respondent or its insurance carrier referred claimant to the Wichita Clinic where on May 22, 2007, claimant saw Dr. Mark S. Dobyns. Dr. Dobyns' notes from that appointment indicate claimant had experienced pain and a lump in his left groin a few days earlier while lifting some trees. The doctor diagnosed a left inguinal hernia and noted the date of injury as May 16, 2007. Dr. Dobyns returned claimant to work with restrictions and also referred claimant to Dr. E. Holmes Brinton for a surgical consultation.

Dr. Brinton saw claimant on June 4, 2007, and offered surgery. On that date the doctor also noted claimant was experiencing low back pain. Two days later, on June 6, 2007, claimant underwent hernia repair surgery. When claimant returned to Dr. Brinton on August 9, 2007, for a follow-up visit, the doctor again noted claimant was experiencing back pain. At that appointment, Dr. Brinton released claimant from treatment and referred him back to Dr. Dobyns for evaluation of the back complaints.

Dr. Dobyns saw claimant on August 10, 2007, and noted the following:

> The patient presents for evaluation. I had initially seen him on 05/22/2007 when he was complaining of pain in the left inguinal area and he was found to have a hernia. At that time, he did not complain of any back pain. He was sent to Dr. Brinton who did surgery. The patient has been off work since this time. On his last visit to Dr. Brinton, he complained of lower back pain and Dr. Brinton could not determine whether this is due to his injury on 05/22/2007 or not so he sent down for

> evaluation. I have reviewed the patient's intake note and initial visit and there is no mention of any low back pain. The patient does not speak English and is here with a translator. The patient states that he started having back pain shortly after this groin pain came on. He feels it is related to his lifting of a tree at work. He did not report this to his employer.
>
> . . . .
>
> I discussed with the patient that I do not think this is related to his injury on 05/22/2007 or not. I am not sure whether this should be covered under worker's compensation or not. He did not report the injury to me or to his employer. I am going to schedule him for some physical therapy if they will approve it and start him on Motrin, tramadol, and Skelaxin. He can go back to work with a 15-pound restriction, no overhead reaching, and no climbing and will see him back in four weeks. If he has any increased pain or problem he is to let us know.[3]

It is not clear the date claimant last worked for respondent. On an unspecified date after the hernia surgery, respondent terminated claimant for being an undocumented worker.

The record does not include any expert medical opinion that addresses whether claimant's back complaints were caused by repetitive traumas from his work as opposed to any single incident or any other mechanism of injury.

Claimant testified he hurt his back in the same accident that caused his hernia. Claimant, who speaks little English, also testified that after the lifting incident he promptly told the person he thought was his supervisor, Antonio Lopez, that he had pain in his groin and back. As a result of claimant's report of injury, either respondent or its insurance carrier referred claimant to the Wichita Clinic for medical treatment.

Judge Clark was persuaded by claimant's testimony and, consequently, found that claimant also injured his back in the May 2007 lifting incident that caused his hernia. At this stage of the proceeding, the undersigned likewise finds claimant's testimony is credible and affirms the finding that claimant injured his back working for respondent.

An injury is compensable under the Workers Compensation Act even when an accident at work only serves to aggravate a preexisting condition.[4] The test is not whether

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[3] Wichita Clinic records entered into the record by the parties' October 24, 2007, letter to Judge Clark.

[4] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

the accident caused a condition but, instead, the test is whether the accident aggravated or accelerated a preexisting condition.[5]

Based upon the medical records entered into evidence, the undersigned finds the date of accident is May 16, 2007. It should be noted, however, that upon a full hearing of the claim the date of accident may be modified, especially if claimant's injury is ultimately determined to be caused by repetitive use, cumulative traumas or microtraumas.[6]

Claimant testified he told Antonio Lopez several times that his back was hurting but Mr. Lopez would not do anything as claimant could walk and continue working. According to claimant, the last time he reported his back complaints to Mr. Lopez was when he could no longer walk due to the hernia. Although respondent and its insurance carrier presented testimony from their witnesses that Mr. Lopez was not a supervisor and did not hold any other type of managerial position, the evidence is uncontradicted that Mr. Lopez was bilingual and told claimant and others on the brush crew what to do. According to claimant, Mr. Lopez was in charge of the brush crew whenever the foreman was absent and respondent would sometimes send the brush crew out with Mr. Lopez in charge. That testimony is credible. Accordingly, respondent placed Mr. Lopez in the position of a supervisor and notice to him was notice to respondent.

In addition, respondent and its insurance carrier do not contest claimant provided timely notice of his accident for purposes of the hernia. Claimant's back was injured or aggravated in the same accident. Consequently, respondent had notice of the accident for purposes of the back injury as workers are not required under the Workers Compensation Act to itemize each and every body part that may have been injured.

The Board has previously addressed this issue and has held the Workers Compensation Act requires the injured worker to report an accident. The Act does not require the worker to itemize or list every body part that is affected by that accident.

> Respondent acknowledges that it received timely notice of claimant's accident and injury to her back but denies receiving notice within 10 days of an accident and injury to claimant's upper extremities. K.S.A. 44-520 requires an injured worker to give notice to her employer of any work-related accident. The statute does not require that the employee give the employer notice of injury or of each and every body part that may have been injured or affected by an accident. Accordingly, the admitted notice that claimant gave to respondent of her September 28, 2004, accident that occurred when claimant was lifting the paint

[5] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[6] See K.S.A. 2006 Supp. 44-508(d).

> pumps satisfies the notice requirement for any injuries she suffered in that accident or any aggravations of preexisting conditions that resulted from that accident, as well as any subsequent work-related aggravations or injuries that occurred as a natural consequence of that accident.[7]

In short, the undersigned finds that claimant provided respondent with timely notice of his accidental injury.

Respondent and its insurance carrier have also raised the issue of timely written claim. K.S.A. 44-520a gives an injured worker a minimum of 200 days following an accident to serve a written claim for workers compensation benefits upon the employer. This proceeding was commenced on August 14, 2007, when claimant filed an application for hearing with the Director of the Division of Workers Compensation. That date is less than 200 days from claimant's May 16, 2007, accident. Accordingly, claimant provided respondent with timely written claim.

The undersigned notes respondent and its insurance carrier also argued claimant should be denied temporary total disability benefits as he was terminated for cause for being an undocumented worker and that respondent could have accommodated his restrictions. But this is a review of a preliminary hearing Order and the Board does not have the authority or jurisdiction at this juncture of the claim to reweigh the evidence to determine if a worker satisfied the definition of being temporarily and completely incapable of engaging in any substantial and gainful employment.[8]

Based upon the above, the October 23, 2007, Order is modified as to the date of accident, but otherwise affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[7] *Watts v. Midwest Painting*, Nos. 1,022,574 & 1,022,575, 2007 WL 4296014 (Kan. WCAB Nov. 28, 2007).

[8] See K.S.A. 44-534a(a)(2).

[9] K.S.A. 44-534a.

WHEREFORE, the undersigned Board Member modifies the October 23, 2007, Order entered by Judge Clark regarding the date of accident, but otherwise affirms the award of benefits.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
Brooke L. Grant, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge